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Protasco Bhd v PT Anglo Slavic Utama & Ors

B HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-362–09 OF 2014
ABU BAKAR JAIS JC
21 OCTOBER 2015

C *Legal Profession — Conflict of interest — Professional conduct — Confidentiality — Clients sought to expunge which all arose from communication between solicitor and clients — Communication well-protected by legal professional privilege prohibiting it from being revealed — Whether privilege absolute unless waived by client — Whether privilege waived by clients* D *— Whether privilege applied as solicitor had duty to court*

The plaintiff sued all three defendants and cited the third respondent, the solicitor for the second and third defendants for contempt arising from the suit. E The plaintiff had obtained leave for this committal. The third respondent affirmed an affidavit in support of his application to set aside the order for leave for committal. In affirming the affidavit, the third respondent alluded to the impugned paragraphs and exhibits now sought to be expunged by the second and third defendants, which all arose from communication between the second F and third defendants as clients and him as solicitor. The crux of the dispute regarding the applications was whether the impugned paragraphs and exhibits were protected from being revealed bearing in mind that it arose from communication between clients and their solicitor. The second and third defendants argued that those matters alluded in the said paragraphs and G exhibits were well protected by legal professional privilege prohibiting it from being revealed. The privilege is absolute, meaning under no circumstances at all should the communication giving rise to the facts and exhibits be divulged and can only be waived if they, as clients, agree that such communication should no longer be kept just between them and the third respondent as solicitor or H counsel. There was no dispute that they did not at any point of time waived that privilege. On the other hand, the third respondent maintained that since his application pertained to setting aside the leave for committal granted, the privilege did not apply as there was a duty on his part to reveal all information because it involves committal proceeding.

I **Held**, allowing the applications of both the second and third defendants:

(1) Under common law, the legal professional privilege accorded is absolute. This privilege can be waived by the client of the third respondent. Only upon the clients not demanding that the right to this privilege be

preserved would it be opened for solicitors to reveal to the public what was said in confidence to them. This was also the common law position that allowed the only exception to the principle of exclusive and absolute legal professional privilege to the clients. There was no basis at all to say that this privilege should not be protected and preserved on the ground of public interest (see paras 12–13 & 15).

(2) The court did not agree to the contention of the third respondent that only when he acts as a witness in a court proceeding would the privilege be absolute but not when he is a party to a proceeding himself. As a solicitor acting for his clients the privilege was absolute either when he acted only as a witness or when he was a party himself in the court action (see para 16).

(3) The paragraphs and exhibits in the affidavit of support of the third respondent arose from communication between him as solicitor and the second and third defendants as clients, absolute legal professional privilege applies in this case. As the second and third defendants had not waived that privilege, the third respondent could not be allowed to use that communication in drafting those paragraphs and alluding to those exhibits (see para 25).

[Bahasa Malaysia summary

Plaintif menyaman ketiga-tiga defendan dan menamakan responden ketiga, peguam yang mewakili defendan kedua dan ketiga kerana penghinaan yang timbul daripada guaman tersebut. Plaintif telah memperoleh kebenaran untuk pengkomitan ini. Responden ketiga mengesahkan satu afidavit bagi menyokong permohonannya untuk mengetepikan perintah kebenaran untuk pengkomitan. Ketika menyokong afidavit tersebut, responden ketiga merujuk kepada perenggan yang dipersoalkan dan ekshibit yang sekarang ini hendak dihapuskan oleh defendan kedua dan ketiga, semuanya timbul daripada komunikasi antara defendan kedua dan ketiga sebagai pelanggan dan beliau sebagai peguamcara. Asas pertikaian mengenai permohonan tersebut adalah sama ada perenggan yang dipersoalkan dan ekshibit dilindungi daripada didedahkan, dengan ingatan bahawa permohonan tersebut timbul daripada komunikasi antara pelanggan dan peguamcara mereka. Defendan kedua dan ketiga berhujah bahawa perkara-perkara yang disentuh dalam perenggan tersebut dan ekshibit dilindungi oleh keistimewaan undang-undang profesional yang melarang daripada didedahkan. Keistimewaan tersebut adalah mutlak, yang bermaksud di bawah keadaan apa sekalipun, semua komunikasi yang membawa kepada fakta dan ekshibit hanya boleh didedahkan dan diketepikan sekiranya mereka, sebagai pelanggan, bersetuju bahawa komunikasi itu tidak lagi disimpan hanya di antara mereka dan responden ketiga sebagai peguam cara atau peguam. Tiada pertikaian bahawa mereka tidak pada bila-bila masa mengetepikan hak istimewa tersebut. Sebaliknya, responden ketiga menegaskan bahawa sejak permohonannya

untuk mengenepikan kebenaran untuk komital diberikan, keistimewaan tersebut tidak terpakai kerana ada tanggungjawab di pihaknya untuk mendedahkan semua maklumat kerana ia melibatkan prosiding pengkomitan.

Diputuskan, membenarkan permohonan defendan kedua dan ketiga:

(1) Di bawah common law, keistimewaan profesional undang-undang yang diberikan adalah mutlak. Keistimewaan ini boleh diketepikan oleh pelanggan responden ketiga. Hanya apabila pelanggan tidak menuntut bahawa hak untuk keistimewaan ini dikekalkan maka hak ini terbuka kepada peguamcara untuk mendedahkan kepada orang ramai apa yang dikatakan secara sulit kepada mereka. Ini juga adalah pegangan common law yang membolehkan satu-satunya pengecualian kepada prinsip keistimewaan undang-undang profesional yang eksklusif dan mutlak kepada pelanggan. Tiada asas sama sekali untuk mengatakan bahawa keistimewaan ini tidak perlu dilindungi dan dipelihara atas alasan kepentingan awam (lihat perenggan 12–13 & 15).

(2) Mahkamah tidak bersetuju dengan hujahan responden ketiga bahawa hanya apabila dia bertindak sebagai saksi dalam prosiding mahkamah maka keistimewaan tersebut adalah mutlak tetapi tidak apabila dia merupakan satu pihak kepada prosiding itu sendiri. Sebagai seorang peguam cara yang bertindak untuk pelanggannya, keistimewaan tersebut adalah mutlak, sama ada semasa ia bertindak hanya sebagai saksi atau apabila dia sendiri menjadi pihak dalam tindakan mahkamah (lihat perenggan 16).

(3) Perenggan dan ekshibit dalam afidavit sokongan daripada responden ketiga timbul daripada komunikasi antara beliau sebagai peguam dan defendan kedua dan ketiga sebagai pelanggan, keistimewaan undang-undang profesional mutlak yang terpakai dalam kes ini. Memandangkan defendan kedua dan ketiga tidak mengetepikan keistimewaan tersebut, responden ketiga tidak boleh dibenarkan untuk menggunakan komunikasi tersebut dalam merangka perenggan-perenggan dan merujuk kepada ekshibit-ekshibit tersebut (lihat perenggan 25).]

Notes

For cases on professional conduct, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1488–1492.

Cases referred to

Bullock v Corry (1878) 3 QBD 356, QBD (refd)
Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14, FC (refd)
Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445, HC (refd)

R v Derby Magistrates' Court, ex parte B; and another appeal [1995] 4 All ER 526, HL (refd)
Three Rivers District Council v Governor and Company of the Bank of England [2005] 1 AC 610, HL (refd)

Legislation referred to

Evidence Act 1950 ss 126, 127, 128, 129

Yudistra Darma Dorai (Effa Ruzanna Anuar and Y Sashiraj with him) (Raj, Ong & Yudistra) for the second defendant.
New Sin Yew (Jamie Wong and Chris YH Tan with him) (Jamie Wong) for the third defendant.
Wong Ho Mun (Teo Qing Qing with him) (Gideon Tan Razali Zaini) for the third respondent.

Abu Bakar Jais JC:

INTRODUCTION

[1] There are two applications for determination by this court. Both are similar in nature from the second and third defendants. It is to strike out or expunge certain paragraphs and exhibits in the affidavit in support of the third respondent's application to set aside the leave granted for committal proceedings against him.

[2] These applications emanated from committal proceedings initiated by the plaintiff against the third respondent.

MATERIAL FACTS

[3] The plaintiff sued all three defendants. The facts giving rise to this suit is not important for the purpose of this written grounds. What is important to note is that the plaintiff cited the third respondent, the solicitor for the second and third defendants for contempt arising from the suit. The plaintiff had obtained leave for this committal. Again the facts giving rise for the committal proceedings is not relevant here.

[4] The third respondent affirmed an affidavit in support of his application to set aside the order for leave for committal. In affirming the affidavit, the third respondent alluded to the impugned paragraphs and exhibits now sought to be expunged by the second and third defendants, the third respondent own clients. Again these paragraphs and exhibits need not be elaborated here for the sole reason the third respondent does not deny that it all arose from communication between the second and third defendants as clients and him as solicitor.

ISSUE

[5] Therefore the crux of the dispute regarding the applications before this court is whether the impugned paragraphs and exhibits are protected from being revealed bearing in mind that it arose from communication between clients and their solicitor.

THE SECOND AND THIRD DEFENDANTS' SUBMISSION

[6] The second and third defendants in gist argue that as the paragraphs and exhibits arose from communication between them as clients and the third respondent as solicitor or counsel, those matters alluded in the said paragraphs and exhibits are well protected by legal professional privilege prohibiting it from being revealed. The privilege is absolute, meaning under no circumstances at all should the communication giving rise to the facts and exhibits be divulged.

[7] That privilege can only be waived if they as clients agree that such communication should no longer be kept just between them and the third respondent as solicitor or counsel. There is no dispute that they did not at any point of time waived that privilege.

THE THIRD RESPONDENT'S SUBMISSION

[8] In essence the third respondent says since his application pertains to setting aside the leave for committal granted, the privilege does not apply. There is a duty on his part to reveal all information because it involves committal proceeding.

[9] The committal proceeding is after all criminal in nature and therefore that privilege should not be applicable in a matter as serious as a committal proceeding.

[10] As an advocate and solicitor, the third defendant contended he has an overriding duty to tell the whole truth in any court's proceeding, making it necessary for him to reveal what was told to him by his clients, the second and third defendants.

[11] He further argues that he has a right to defend himself for the committal even to the extent of revealing what transpired between him as solicitor and the second and third defendants as clients.

THE COURT'S FINDINGS

[12] First it ought to be pointed out that under common law, the legal professional privilege accorded is absolute. This is explained in the case of *R v Derby Magistrates' Court, ex parte B; and another appeal* [1995] 4 All ER 526. Further, the common law maxim 'once privilege, always privilege' as propounded by Cockburn CJ in *Bullock v Corry* (1878) 3 QBD 356 also established the fact that such privilege as being absolute and this maxim has stood the test of time till this very moment. Therefore there is no room for the third respondent, as counsel for the second and third defendants, to be excused from divulging the privileged communications he has had with his clients. He for whatever reasons cannot reveal what was told to him by his clients. That is the plain meaning of the principle legal professional privilege is absolute.

[13] I have also considered that this privilege can be waived by the client of the third respondent. Only upon the clients not demanding that the right to this privilege be preserved would it be opened for solicitors to reveal to the public what was said in confidence to them. This is also the common law position that allows the only exception to the principle of exclusive and absolute legal professional privilege to the clients.

[14] In this regard, in this case before this court now there is no dispute that the second and third defendants being clients of the third respondent had not at any time waived its rights to this privilege. Therefore the third respondent is not at liberty to divulge any form of conversation between him and the second and third defendants.

[15] I have also considered that there is no basis at all to say that this privilege should not be protected and preserved on the ground of public interest. One might be tempted to think that public interest in whatever manner arising should be sufficient reason to conclude that the privilege is not applicable to protect the communication between the clients and their solicitors. The absolute protection of this privilege is not compromised even when public interest is considered, resulting in such communication not to be revealed or divulged. This is the decision in the case of *Three Rivers District Council v Governor and Company of the Bank of England* [2005] 1 AC 610.

[16] I also do not agree to the contention of the third respondent that only when he acts as a witness in a court proceeding would the privilege be absolute but not when he is a party to a proceeding himself. As a solicitor acting for his clients the privilege is absolute either when he acts only as a witness or when he is a party himself in the court action. I seek support for this proposition from the case *R v Derby Magistrates' Court* where Lord Taylor CJ said:

> ... no exception should be made to the absolute nature of legal professional privilege, once established ...

[17] That judgment above allows for no exception at all when it comes to the privilege except the waiver of the clients as explained earlier, prohibiting the solicitors under any circumstances to divulge the conversation and instruction between clients and solicitors.

[18] The position with respect to legal professional privilege in Malaysia is even clearer as this privilege has been codified in the Evidence Act 1950 by ss 126–129 of the same. The case of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 deals with these provisions where it is said:

> As regards professional communications, the rule is now well settled that where a barrister or solicitor is professionally employed by a client, all communication which passes between them in the course and for the purpose of that employment are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them whether they be in the form of title deeds, wills, documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity, and this even though third persons were present. (See Sarkar on Evidence (10th Ed) p 1080.)
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> Section 126also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in *Bullock v Corry* (1878) 3 QBD 356).
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> 'Unless with his client's express consent', appearing in s 126. The privilege is that of a client; he may expressly waive the privilege under s 126 or impliedly under the latter part of s 128 by calling the barrister, pleader, etc, as witness and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege if he gives evidence in the suit either at his instance or at the instance of the opposite party. (Sarkar on Evidence (10th Ed) p 1082.)

[19] The Federal Court in the case of *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14 also said:

> Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, ie the client.

[20] Therefore it is clear that both under common law and also the position in Malaysia, legal professional privilege is:

(a) absolute;

(b) protected from public interest consideration; and

(c) waived only by the clients.

[21] As indicated the information or communication pertaining to the paragraphs and exhibits sought to be struck out in the affidavit of support of the third respondent's came from the second and third defendants. At the risk of repetition, there is no dispute that these two defendants had not at any time waived the privilege. Therefore the third respondent is left with no option. He cannot use that information or communication to enact those paragraphs and show those exhibits.

[22] I have also taken note of the contention of the third respondent that since this is a contempt proceeding against him personally, the privilege accorded to the second and third defendants should not shelter them from being divulged of the communication between them and the third respondent. The third respondent says that because this is contempt proceeding, which borders on criminal action and is a serious matter, no privilege should come to play. In this regard I do not agree that the privilege has limitation in its operation and it does not matter that the third respondent is facing a very serious contempt action as the privilege is absolute as explained earlier. *R v Derby Magistrates' Court* is a murder case and yet the privilege accorded remained intact. Therefore it does not matter even if the case is a criminal case having the harshest punishment as the privilege should not at all cost be disturbed. In this regard no distinction should apply between a civil and a criminal case when legal professional privilege is considered.

[23] I have also considered the submission of the third respondent that the privilege cannot be applied against him as he has the ultimate duty in upholding justice, be honest and truthful in the courts of law. I have no doubt that any parties before the courts including the judges and not just litigants, their counsel and witnesses must all have justice and the truth in the forefront of their minds when appearing in courts. However the privilege accorded for clients in their communication with their lawyers should never be compromised. It is only through knowing that what is revealed will not be shared with others that the relationship between clients and their solicitors is founded to its core. Any breach of this foundation will result in the trust between clients and their solicitors be shaken to its root. That is precisely the reason why in Malaysia and under common law the privilege has been decided and still remains absolute.

[24] There is also arguments by all parties to these applications on whether the impugned paragraphs and exhibits in the affidavit of the third respondent sought to be expunged are actually relevant for the third respondent's application to set aside the leave granted for committal against him. I have considered there is no necessity whatsoever to make any finding on this issue as the legal professional privilege should never be disturbed. Hence even if those paragraphs and exhibits are relevant, it would nonetheless be defeated because

it arose from communication between the third respondent as solicitor or counsel and the second and third defendants as clients, attracting absolute legal professional privilege.

CONCLUSION

[25] As there is no dispute that the paragraphs and exhibits in the affidavit of support of the third respondent arose from communication between him as solicitor and the second and third defendants as clients, absolute legal professional privilege applies in this case. As the second and third defendants had not waived that privilege, the third respondent cannot be allowed to use that communication in drafting those paragraphs and alluding to those exhibits.

[26] Hence the applications of both the second and third defendants are allowed.

Applications of both the second and third defendants allowed.

Reported by Afiq Mohamad Noor